MALAYAN BANKING BHD v. CHIP LAM SENG ENTERPRISE BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[COMPANIES (WINDING-UP) PETITION NO: 28NCC-639-08-2014]
16 DECEMBER 2014

COMPANY LAW: *Winding-up – Stay – Application to stay earlier winding-up proceedings – Respondent initiated voluntary winding-up subsequent to filing of petition by petitioner – Whether company could apply for retrospective leave to commence voluntary winding-up – Whether voluntary winding-up bona fide – Whether petitioner's application for appointment of provisional liquidator and winding-up petition should be stayed – Companies Act 1965, ss. 254(1)(b), 276*

COMPANY LAW: *Winding-up – Provisional liquidator – Appointment of – Respondent initiated voluntary winding-up after filing of winding-up petition by petitioner and appointed own provisional liquidator – Petitioner opposed appointment and sought appointment of its own provisional liquidator – Whether petitioner should file a new suit under s. 266 Companies Act 1965 to invalidate appointment of liquidator – Whether requirement under r. 35(2) Companies (Winding-up) Rules 1972 mandatory in appointing a provisional liquidator – Whether petitioner's winding-up petition unlawfully frustrated by respondent's actions – Companies Act 1965, ss. 217(2)(b), 221(2)(b), 231, 276, 304 – Companies (Winding-up) Rules 1972, rr. 35(1), 194(1) – Courts of Judicature Act 1964, s. 16 – Interpretation Acts 1948 and 1967, ss. 23(1), 40(1)*

This was the petitioner's application ('this petition') to wind up the respondent *vide* a notice under s. 218(2)(a) Companies Act 1965 ('CA') following the respondent's failure to pay its debts in accordance with a summary judgment obtained by the petitioner. Following the filing of this petition, the petitioner filed a motion to the winding-up court ('PL application') on 5 September 2014 to appoint a provisional liquidator ('PL'). At the same time, the respondent's directors signed a circular director's resolution on 5 September 2014, which resolved, amongst others, (i) that the respondent was unable to continue to do business; (ii) that one Mr Tan Chil Kin ('TCK') be appointed as the respondent's PL; and (iii) that the respondent be voluntarily wound up. Subsequently, the respondent filed a summons ('respondent's application') for, amongst others, leave of the winding-up court for the respondent to resolve to be wound up voluntarily at a meeting of the respondent's contributories; that by operation of law, in particular ss. 217 and 263(2) of the CA, this petition was subject to an automatic stay since 5 September 2014; and that the respondent's PL be directed to report to the winding-up court pursuant to ss. 217(2)(d) and 289 of the CA. The petitioner's counsel was only informed of the voluntary winding up and the appointment of TCK during the first case management of this petition. Accordingly, the petitioner opposed the appointment of

TCK and sought for the said appointment to be declared null and void. By consent of the petitioner and the respondent, both the PL application and the respondent's application were heard together. Hence, the issues to be decided were, *inter alia* (i) whether the respondent could apply for retrospective leave to commence voluntary winding-up proceedings when this petition had already been filed against it; (ii) whether the respondent's voluntary winding up was *bona fide*; (iii) whether the winding-up court should grant leave under s. 276 CA for the respondent's voluntary winding-up; (iii) whether the petitioner should file a new suit under s. 266 of the CA to invalidate TCK's appointment; (iv) whether the PL application and this petition should be stayed under s. 263(2) CA; (v) whether the PL application should be allowed; (vi) whether the requirement under r. 35(2) of the Companies (Winding-up) Rules 1972 ('WUR') was mandatory in appointing a PL; and (vii) whether this winding-up court should order the winding-up of the respondent.

Held (ordered accordingly):

(1) If a winding up petition was presented on the ground of a company's inability to pay debts before the company's voluntary winding up, s. 276 of the CA required the company to obtain leave of the winding-up court before that company passed a special resolution under s. 254(1)(b) of the CA to commence voluntary winding-up. However, if the winding-up petition had been presented on the company's inability to pay its debts, either before or after the commencement of the company's voluntary winding-up, the company may apply for retrospective leave from the winding-up court. (paras 46 & 47)

(2) In the instant case, the respondent's voluntary winding up was not *bona fide* and was contrived to unlawfully thwart both the petitioner's PL application as well as this petition. This was so, as the respondent failed to adduce any credible evidence on why the respondent's directors had to immediately cease the respondent's business on 5 September 2014 and to immediately hand over the respondent's affairs to TCK on that date and why the respondent's contributories could not expeditiously be considered and resolved by way of a special resolution to commence voluntary winding-up of the respondent. (para 48)

(3) If the respondent's voluntary winding-up was *bona fide*, there was no reason for the respondent to wait until 5 September 2014 for the respondent to 'realise' the need to resort to the voluntary winding-up procedure. No documentary evidence was adduced by the respondent to show that before 5 September 2014, the respondent's directors were advised by professional and reputable accountants, preferably specialists in corporate insolvency, that voluntary winding-up was in the best interest of the respondent's creditors and contributories. The respondent merely relied on a circular resolution of its directors. Following that, the failure of the respondent's solicitors to inform the petitioner on the

voluntary winding-up and the failure to provide the petitioner with the voluntary winding-up documents clearly evidenced a lack of good faith regarding the respondent's voluntary winding up. (para 48)

(4) The respondent's claim that the voluntary winding-up was necessary to avoid any allegation of fraudulent trading under s. 304 of the CA against the respondent's directors was not a valid consideration as the respondent's directors owed fiduciary and statutory duties to the respondent. In any event, this reason could not be accepted because the respondent purportedly ceased its business on 5 September 2014 and TCK should have exercised his powers as respondent's PL to voluntarily wind-up the respondent. There was no evidence to show that the respondent's directors had endeavoured to ensure that TCK exercised his powers. Hence, the respondent had proceeded with 'extra-ordinary' speed to appoint TCK for a collateral purpose, namely to unlawfully frustrate the petitioner's PL application and this petition. (para 48)

(5) A winding-up court is empowered, if not duty bound, to refuse leave under s. 276 CA for a voluntary winding-up which was commenced for an improper purpose of hindering unlawfully a valid winding-up petition. The court was satisfied that the respondent had embarked on a voluntary winding-up for an improper purpose, namely to forestall unlawfully the petitioner's PL application and this petition. Further, there were matters which required investigation and supervision of the winding-up court. The respondent also failed to discharge the burden to establish special circumstances to show that the respondent's voluntary liquidation was preferable to a compulsory winding-up by the court as the respondent's reasons did not amount to special circumstances to justify leave under s. 276 of the CA. Accordingly, leave under s. 276 of the CA for the respondent to resolve to be wound-up voluntarily was declined. (paras 49-53)

(6) Section 276 of the CA conferred discretionary power on the winding-up court to grant leave for a company's voluntary winding-up. Further, s. 40(1) of the Interpretation Acts 1948 and 1967 ('IA') conferred power on the winding-up court to do whatever that was 'reasonably necessary' after the winding-up court decided to grant leave or otherwise under s. 276 of the CA. As leave to the respondent to continue its voluntary winding-up was refused, s. 266 of the CA had no application in this case. In light of that, based on the discretion under s. 276 of the CA read with s. 40(1) of the IA, TCK's appointment as PL for the respondent's voluntary winding-up was declared null and void and should be set aside. (paras 55 & 56)

(7) The petitioner's PL application should be allowed, amongst others, due to the fact that the petitioner had a good *prima facie* case to wind up the respondent based on the petitioner's summary judgment obtained against the respondent. Secondly, the respondent *vide* the evidence adduced was

unable to pay its own debts. Thirdly, there was an urgent need to preserve the *status quo* and to prevent dissipation of the respondent's assets. Further, the balance of convenience was clearly in favour of granting the petitioner's PL application and considering all the circumstances, it was only right to appoint a PL for the respondent's compulsory winding-up. (para 68)

(8) The winding up court's power to appoint a PL was conferred by s. 231 of the CA and r. 35(1) of the WUR. Those two provisions do not contain a mandatory requirement as stated in r. 35(2) of the WUR. The circumstances in which a winding up court may appoint a PL under s. 231 of the CA and r. 35(1) of the WUR were not confined by r. 35(2) of the WUR. Furthermore, r. 35(2) of the WUR was a subsidiary legislation made under s. 372 of the CA and s. 16 of the Courts of Judicature Act 1964. According to s. 23(1) of the IA, any subsidiary legislation that was inconsistent with an Act of Parliament shall be void to the extent of the inconsistency. If r. 35(2) of the WUR was a mandatory requirement in respect of the winding up court's power to appoint a PL, such a mandatory requirement was inconsistent with the wide powers conferred by s. 231 of the CA on the winding-up court. Hence, such a mandatory requirement under r. 35(2) of the WUR may be void under s. 23(1) of the IA. In the instant case, the winding-up court pursuant to the discretion accorded to it under s. 221(2)(b) of the CA and r. 194(1) of the WUR dispensed with the application of r. 35(2) of the WUR and ordered the appointment of DTK as the respondent's PL. (paras 73 & 74)

(9) Pursuant to s. 217(2)(b) CA, the respondent should be compulsorily wound-up as the respondent's voluntary winding-up could not be continued with due regard to the interests of the respondent's creditors and contributories. (para 78)

Case(s) referred to:

Ameriasa Tours & Travel Sdn Bhd v. PJB Pacific Advisory Services Sdn Bhd [2004] 2 CLJ 586 HC ***(refd)***

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Emporium Jaya (Bentong) Sdn Bhd (In Liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd [2002] 3 CLJ 10 HC ***(refd)***

GKM Amal Bhd v. Bank Utama (Malaysia) Bhd [2004] 1 CLJ 769 CA ***(refd)***

Government Insurance Office of NSW v. Krey Investments Pty Ltd (Unreported) (1990) ***(refd)***

Hasjuara (M) Sdn Bhd v. Bio Science Capital Sdn Bhd; Global Health Capital Sdn Bhd (Applicant) [2009] 1 LNS 1056 HC ***(foll)***

Hongkong and Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn Bhd [1992] 1 LNS 26 HC ***(refd)***

Indah Water Konsortium Sdn Bhd v. Yong Kon Fatt [2007] 4 CLJ 613 CA ***(foll)***

Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [2001] 4 CLJ 549 CA ***(refd)***

K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors [2005] 1 CLJ 793 FC ***(refd)***
Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd [1990] 1 CLJ 292; [1990] 2 CLJ (Rep) 189 HC ***(refd)***
Korea Asset Management Corp v. Daewoo Singapore Pte Ltd (In Liquidation) [2004] 1 SLR 671 ***(foll)***
Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***
Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd [2002] 4 CLJ 401 FC ***(refd)***
Natseven TV Sdn Bhd v. Television New Zealand Ltd [2001] 4 CLJ 722 HC ***(refd)***
Pac Asian Services Pte Ltd v. European Asian Bank AG [1987] 1 LNS 143 CA ***(refd)***
Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***
Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
Progress Printers and Distributors Pty Ltd v. Production and Graphics Communications Pty Ltd (1996) 21 ACSR 241 ***(refd)***
PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd [1998] 4 CLJ Supp 437 HC ***(refd)***
Pui Chiau Tien v. Foi Chaw Leong & Anor [2004] 5 CLJ 145 HC ***(dist)***
Re Akai Australia Pty Ltd (1978) 3 ACLR 353 ***(refd)***
Re Horsham Kyosan Engineering Co Ltd [1972] VR 403 ***(foll)***
Re Lo Siong Fong [1994] 1 LNS 188 ***(refd)***
Re North Western Fruit Growers Pty Ltd [1965] VR 306 ***(foll)***
Re Septimus Parsonage & Co [1901] 2 Ch 424 ***(foll)***
Re Seremban General Agency Ltd (1923) 3 FMSLR 3 ***(refd)***
Re South Australian Air Conditioning Centre Pty Ltd (1977) 2 ACLR 539 ***(foll)***
Re Southard & Co Ltd [1979] 3 All ER 556 ***(refd)***
Sri Hartamas Dvpt Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***
Sysma Construction Pte Ltd v. EK Development Pte Ltd [2007] 2 SLR 742 ***(foll)***
The Bank of East Asia Ltd Singapore Branch v. Axis Incorporation Bhd [2009] 5 CLJ 83 HC ***(dist)***
Wiraflor (Malaysia) Sdn Bhd v. Bio Science Capital Sdn Bhd [2011] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 15, 18
Civil Law Act 1956, s. 11
Companies (Winding-up) Rules 1972, rr. 5(1)(a), (b), (c), (d), (e), (f), (g), (2), 7(2), 28(1), 35(1), (2), 194(1)
Companies Act 1965, ss. 132(1), (1A), (1B), 152(1), (2), 152A, 211(a), (b), 217(1), (2)(b), (d), 218(1)(e), (2)(a), 221(2)(b), 231, 237(3), 254(1)(b), 255(1)(a), (b), (3), (6)(a), 256(1), 258(1), 259(2), 261(1), 263(2), 266, 276, 289, 304(1), 372
Courts of Judicature Act 1964, s. 16
Interpretation Acts 1948 and 1967, ss. 2(1)(b), 17A, 23(1), 40(1)
Rules of Court 2012, O. 88 r. 2
Rules of the High Court 1980, O. 42 r. 12

Companies Act [Sing], ss. 291(3), 299(2)

For the petitioner - Claudia Cheah (Nur Syafinaz Vani with her); M/s Skrine
For the respondent - Wong Rhen Yen (Carolyn Cheah with him); M/s Faizul Nasir & Assocs
For liquidator, Tan Chil Kin - M Menon (Mohd Khairul Mohd Karim with him); M/s Khairul Azwan & Co
For supporting creditor, Ambank (M) Bhd - Koh Yew Chong (Justin Leong with him); M/s Koh Yew Chong & Partners
For supporting creditor, Hong Leong Bank Bhd - Lau Kee Sern (CL Meng with him); M/s Shook Lin & Bok
For supporting creditor, Standard Chartered Bank (M) Bhd - S Ramesh (SY Ong with him); M/s Adnan Sundra & Low
For supporting creditor, CIMB Bank Bhd - Izahairani Izani; M/s Shearn Delamore & Co
For supporting creditor, RHB Bank Bhd - Navamalar Ganesan; M/s Anad & Noraini
For supporting creditor, Public Bank Bhd - Messrs Kean Chye & Sivalingam

Reported by S Thara

JUDGMENT

Wong Kian Kheong JC:

A. Introduction

[1] This case discusses the court's power to appoint a provisional liquidator ('PL') pending the disposal of a winding up petition ('petition'). Before this winding up court can hear the petitioner's ('petitioner') application to appoint a PL, the respondent company ('respondent') proceeded with "extra-ordinary speed" on a voluntary winding up and appointed the respondent's own choice of PL! The question then arises as to whether this winding up court should grant leave under s. 276 of the Companies Act 1965 ('CA') for the respondent to resolve to be wound up voluntarily despite the pending petition.

[2] The petitioner is Malayan Banking Bhd and the respondent is Chip Lam Seng Enterprise Bhd.

B. Facts

Group Of Companies Founded And Controlled By "Tan Family"

[3] The "Chip Lam Seng" group of companies ('CLS Group') is a family business started by the late Mr Tan Koon Puan @ Tan Koon Pun and his wife, Madam Tham Yoke Cheng. According to the petitioner, the CLS Group is now controlled by Mr Tan Keng Beng ('TKB').

[4] The respondent is the holding company of the CLS Group with shares in the respondent's subsidiary companies in the CLS Group.

Proposal To Restructure CLS Group's Debts

[5] The CLS Group was in financial difficulties and appointed Grant Thornton Consulting Sdn Bhd ('Grant Thornton') to prepare a debt restructuring proposal for the CLS Group. Grant Thornton prepared a report dated 30 November 2012, "Business Review Report in Relation to Proposed Debt Restructuring" of CLS Group ('Grant Thornton's report').

[6] Grant Thornton's report stated, among others, as at December 2012, the CLS Group had the following debts of:

(a) RM500,805,244 owed to 11 banks (debts due to banks). The petitioner is the largest creditor in this group of creditor banks with a total outstanding debt of RM262,935,292 (equivalent to 52.50% of the debts due to banks); and

(b) RM10,746,766 owed to trade creditors (debts due to trade creditors). Of a total debt of RM511,522,010 (a total of debts due to danks and debts due to trade creditors), the petitioner holds 51.39% of the total indebtedness of CLS Group.

Compulsory Winding Up Of Two Members Of CLS Group

[7] The following two companies in the CLS Group have already been wound by court:

(a) CLS Marketing (M) Sdn Bhd ('CLSM'). Mr Duar Tuan Kiat ('DTK') from Messrs Ernest & Young has been appointed as liquidator for CLSM; and

(b) Chip Lam Seng Sdn Bhd ('CLS'). Mr Tee Guan Pian ('TGP') has been appointed as CLS's liquidator but AmBank (M) Bhd ('AmBank') has filed an application to:

(i) substitute TGP with DTK as CLS's liquidator; or

(ii) appoint DTK as joint liquidator of CLS with TGP.

Winding Up Of Respondent By AmBank

[8] On 24 February 2014, AmBank obtained an order from the Kuala Lumpur High Court ('KLHC') to wind up the respondent (AmBank's winding up order). DTK was appointed as the liquidator of the respondent.

[9] DTK has carried out his duties as the respondent's liquidator (Ambank's liquidation) and prepared a summary of his action and preliminary findings as the respondent's liquidator ('DTK's summary'). I'll discuss DTK's summary later in this judgment.

[10] On 26 August 2014, the Court of Appeal:

(a) set aside AmBank's winding up order with no order as to costs on the ground that the respondent had changed its registered address and AmBank's notice of demand under s. 218(2)(a) CA was wrongly served on the respondent's former address; and

(b) gave liberty to AmBank to file a fresh winding up petition against the respondent.

TKB's Receiving Order

[11] There is a peculiar aspect in this case. On 12 March 2014, TKB obtained from the Bankruptcy Senior Assistant Registrar in KLHC an *ex parte* receiving order ('TKB's RO') against TKB himself. TKB's RO, provided, among others:

(a) any action, execution or legal process against TKB's assets be stayed until a proposal for composition of creditors has been considered by TKB's creditors under ss. 15 and 18 of the Bankruptcy Act 1967; and

(b) the Director General of Insolvency be the receiver of TKB's assets.

C. This Petition

[12] The petitioner has obtained a summary judgment in KLHC against the respondent for a sum of RM8,886,339.01 on 19 December 2013 ('summary judgment'). The respondent did not appeal to the Court of Appeal against the summary judgment.

[13] On 29 January 2014, the petitioner served a notice under s. 218(2)(a) CA ('petitioner's statutory demand') on the respondent to pay the summary judgment sum within 21 days ('stipulated period') from the date of the respondent's receipt of the petitioner's statutory demand. The stipulated period expired on 19 February 2014 but the respondent did not pay the summary judgment sum as demanded in the petitioner's statutory demand.

[14] After the Court of Appeal set aside Ambank's winding up order, this petition (court encl. no. 1) was presented on 28 August 2014 to wind up the respondent ('this petition').

[15] This petition was served on the respondent's registered address on 28 August 2014.

Petitioner's Application To Appoint PL

[16] On 2 September 2014, the petitioner's solicitors, Messrs Skrine ('petitioner's solicitors'), sent a letter (letter dated 2 September 2014 from petitioner's solicitors) to the respondent's solicitors, Messrs Dennis Nik & Wong ('Messrs DNW') to inform that this petition had been filed against the respondent and the petitioner's solicitors would be filing a motion to the

winding up court to appoint a PL (petitioner's PL application). The letter dated 2 September 2014 from petitioner's solicitors also requested Messrs DNW to inform the petitioner's solicitors as to whether Messrs DNW had instruction to accept service of the petitioner's PL application.

[17] There was no reply by Messrs DNW to the letter dated 2 September 2014 from petitioner's solicitors. Instead, Messrs Faizul Nasir & Associates ('Messrs FNA') replied to the letter dated 2 September 2014 from petitioner's solicitors by way of a letter dated 4 September 2014 and informed the petitioner's solicitors that Messrs FNA had instruction to accept service of the petitioner's PL application (Messrs FNA's letter dated 4 September 2014).

[18] On 5 September 2014, the petitioner's PL application is filed in this court. The date 5 September 2014 is significant as will be explained below.

Respondent's Voluntary Winding Up

[19] According to the affidavits filed in this petition, all the following events took place on 5 September 2014:

(a) the respondent's only two directors, Encik Rosdi bin Abd Wahab (Encik Rosdi) and Mr Saravanan a/l Subramaniam, signed a circular directors resolution (respondent's directors resolution) which resolved, among others:

  (i) the respondent's directors "formed the opinion that the (respondent) will be unable to continue its business by reason of its liabilities";

  (ii) Mr Tan Chil Kin ('TCK') be appointed as the respondent's PL;

  (iii) pursuant to s. 152A CA, the respondent's company secretary be authorised to prepare a resolution in writing of the respondent's members (respondent's members resolution) which is deemed to have been passed at the respondent's extraordinary general meeting ('EGM') as:

    (1) a special resolution that there be a creditors' voluntary winding up of the respondent under s. 254(1) CA; and

    (2) an ordinary resolution to appoint TCK as the respondent's liquidator; and

  (iv) a meeting of the respondent's creditors be summoned to be held on 25 September 2014 (respondent's proposed creditors meeting) to:

    (1) consider the respondent's statement of affairs ('SOA') together with a list of creditors and the estimated amount of the creditors' claims; and

    (2) to appoint TCK as the respondent's liquidator for the purpose of winding up the respondent's affairs as a creditors' voluntary winding up under s. 261(1) CA;

(b) TCK sent a letter dated 5 September 2014 consenting to act as PL and liquidator of the respondent. TCK filed Form 72 with the Registrar of Companies ('ROC') and the official receiver ('OR') regarding TCK's appointment as PL for the respondent; and

(c) the respondent's two directors affirmed a statutory declaration ('respondent's SD') declaring, among others, that the respondent could not "by reason of its liabilities continue its business".

Respondent's Application

[20] The respondent filed a summons (court encl. no. 12) ('respondent's application') for the following orders:

(a) leave of the winding up court for the respondent to resolve to be wound up voluntarily at a meeting of the respondent's contributories;

(b) the respondent's creditors' voluntary winding up has commenced on 5 September 2014 and by operation of law, in particular ss. 217 and 263(2) CA, this petition is subject to an automatic stay since 5 September 2014;

(c) TCK, the respondent's appointed PL, be directed to report to this winding up court with regard to the wishes and interest of the respondent's contributories and creditors as ascertained in the meetings of the respondent's contributories and creditors held pursuant to ss. 217(2)(d) and 289 CA; and

(d) the respondent or TCK be given liberty to apply to this winding up court for such further orders and directions as may be appropriate or necessary in the circumstances of the case.

[21] The respondent's affidavit affirmed by Encik Rosdi on 18 September 2014, exhibited a list of 22 creditors of the respondent (respondent's list of creditors) with a total claim of RM497,858,026.50. The respondent's list of creditors stated, among others:

(a) the respondent owed the petitioner a sum of RM262,935,292; and

(b) the respondent owed TKB a sum of RM19,608.

D. Legal Proceedings

[22] During the first case management of this petition on 9 September 2014, for the first time the respondent's learned counsel informed this court and the petitioner's learned counsel that the respondent had commenced voluntary winding up and had appointed a PL for that purpose.

[23] The petitioner's solicitors sent a letter dated 12 September 2014 to Messrs FNA (letter dated 12 September 2014 from petitioner's solicitors) which, among others:

(a) stated that the petitioner's solicitors were "very surprised" by the respondent's "purported voluntary winding up and appointment of a (PL)";

(b) informed Messrs FNA that the petitioner took objection to the respondent's "purported voluntary winding up and appointment of a (PL)"; and

(c) requested Messrs FNA to "immediately" give the petitioner's solicitors "a full set of all documents filed by (the respondent) in the purported voluntary winding up" and to inform the petitioner's solicitors who was the PL appointed by the respondent.

[24] Messrs FNA did not reply to the letter dated 12 September 2014 from petitioner's solicitors.

[25] On 19 September 2014, the petitioner's PL application and the respondent's application came up for hearing in this court. By consent of the petitioner and the respondent, both the petitioner's PL application and the respondent's application are heard together. The petitioner's learned counsel, Ms Claudia Cheah Pek Yee, applied for *status quo* to be preserved. The respondent's learned counsel, Mr Wong Rhen Yen, rightly gave an undertaking to this court not to hold the respondent's proposed creditors meeting as well as the meeting of the respondent's contributories until the disposal of both the petitioner's PL application and the respondent's application.

[26] Pending the disposal of both the petitioner's PL application and the respondent's application, on 19 September 2014, on the application of the petitioner's learned counsel, this court gave an *ad interim* order that TCK should not take any action as the respondent's PL in respect of the respondent's voluntary winding up ('*ad interim* order').

E. Form Of Petitioner's PL Application

[27] The petitioner initially filed the petitioner's PL application by way of a notice of motion (court encl. no. 4). In view of the respondent's appointment of TCK as PL under the respondent's voluntary winding up, the petitioner filed an amended notice of motion (court encl. no. 18) as the petitioner's PL application to add a prayer that TCK's appointment as the respondent's PL be declared null and void and be set aside.

[28] A notice of motion has been used in the following High Court cases to apply for the appointment of a PL:

(a) *Hongkong and Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 1 LNS 26; [1992] 2 MLJ 370, at p. 375 (*HSBC*'s case); and

A (b) *Ameriasa Tours & Travel Sdn Bhd v. PJB Pacific Advisory Services Sdn Bhd* [2004] 2 CLJ 586, at p. 588 (*Ameriasa Tours & Travel*'s case).

[29] In the High Court case of *Emporium Jaya (Bentong) Sdn Bhd (In Liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd* [2002] 3 CLJ 10, at p. 17 (*Emporium Jaya*'s case), the petitioner filed a summons in chambers to apply B for a PL.

[30] All the above cases did not discuss whether an application to appoint a PL should be made by way of a notice of motion or a summons.

[31] I am of the respectful view that an application for the appointment of C a PL should be made by way of a summons as provided in r. 7(2) of the Companies (Winding-up) Rules 1972 ('WUR'). My opinion is premised on the following reasons:

(a) certain applications to the winding up court have to be made in open court according to r. 5(1)(a) to (g) WUR. An application to appoint a PL D does not fall under r. 5(1)(a) to (g) WUR. As such, the petitioner's PL application falls within r. 5(2) WUR and may be heard in chambers; and

(b) if an application is to be heard in chambers, r. 7(2) WUR states that such an application "shall be made by summons in Form 1".

E **[32]** When I pointed out the above to the petitioner's learned counsel at the hearing of the petitioner's PL application, the petitioner's learned counsel orally applied for the petitioner's PL application to be heard as a summons in chambers. The respondent's learned counsel magnanimously and properly did not object to such an oral application. I exercised the discretion conferred on a winding up court by s. 221(2)(b) CA (the winding up court may F "dispense with any … steps being taken which are required by (CA), or by the rules") and r. 194(1) WUR (no proceedings under CA or WUR shall be invalidated by any formal defect or any irregularity unless the winding up court is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the G winding up court) and allowed this oral application. I decided as such because no prejudice would be caused to the respondent and I relied on the following cases:

(a) the Court of Appeal's judgment in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, at H p. 265;

(b) the Court of Appeal case of *GKM Amal Bhd v. Bank Utama (Malaysia) Bhd* [2004] 1 CLJ 769, at p. 772; and

I (c) the High Court's decision in *Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd* [1990] 1 CLJ 292; [1990] 2 CLJ (Rep) 189; [1990] 2 MLJ 46, at p. 47.

F. Respondent's Creditors

[33] The following banks filed notices of intention to appear in this petition under r. 28(1) WUR ('supporting creditors'):

(a) AmBank;

(b) Standard Chartered Bank Malaysia ('SCB');

(c) Hong Leong Bank Bhd ('HLB');

(d) CIMB Bank Bhd ('CIMB');

(e) RHB Bank Bhd ('RHB'); and

(f) Public Bank Bhd ('PBB').

[34] The debts owed by the respondent to the supporting creditors totalled RM149,153,146.36.

[35] The supporting creditors support the petitioner's PL application and oppose the respondent's application.

G. Second Winding Up Petition Against Respondent

[36] Global Champ Consultants Sdn Bhd ('GCC'), a creditor of the respondent, has filed a winding up petition in KLHC against the respondent for a debt allegedly due by the respondent to GCC ('GCC's petition'). GCC's petition is still pending in KLHC.

H. TKB's Default Judgment Against Respondent

[37] On 2 September 2014, TKB filed a suit in KLHC against the respondent ('TKB's suit') to claim for RM488,444,360 based on an alleged undertaking and indemnity given by the respondent to TKB ('TKB's indemnity').

[38] TKB obtained a judgment in default of appearance for the sum of RM488,444,360 against the respondent on 18 September 2014 ('TKB's default judgment').

I. Respondent's Submission

[39] The respondent advanced the following contentions to support the respondent's application and to oppose the petitioner's PL application:

(a) this winding up court should grant retrospective leave to the respondent under s. 276 CA for the respondent's voluntary winding up to proceed because:

(i) a creditors' voluntary winding up is "more efficient and cost-effective" than a compulsory winding up;

(ii) a creditors' voluntary winding will not trouble the winding up court;

(iii) there is no prejudice to the respondent's creditors as the respondent's creditors have a right to ventilate any issue before the PL appointed for the respondent's voluntary liquidation at the respondent's proposed creditors meeting. The respondent's creditors may then exercise their right to appoint a liquidator of their choice for the respondent's voluntary winding up;

(iv) a creditors' voluntary winding up is necessary as the respondent has concluded that the respondent cannot continue its affairs due to its financial state and accordingly, any continuation of the respondent's affairs may render the respondent's directors and/or officers to be liable for fraudulent trading under s. 304 CA; and

(v) a creditors' voluntary winding up is a more democratic process as it takes into account all the wishes of the respondent's creditors and contributories

('Respondent's five reasons});

(b) TKB's default judgment is a nullity as no leave of the court has been obtained by TKB under s. 263(2) CA. Hence, there is no prejudice to the respondent's unsecured creditors;

(c) under s. 217(2)(d) CA, the winding up court shall not make a winding up order of the respondent unless the court is satisfied that the respondent's voluntary winding up cannot be continued with due regard to the interests of the respondent's creditors and contributories; and

(d) the petitioner's PL application should be dismissed with costs because:

(i) the petitioner has failed to obtained leave of court under ss. 255(6)(a) and 263(2) CA to proceed with the petitioner's PL application;

(ii) the petitioner has failed to comply with r. 35(2) WUR; and

(iii) the petitioner's application to declare TCK's appointment as the respondent's PL for the respondent's voluntary winding up as null and void, should be made by way of a fresh suit according to s. 266 CA. Under O. 88 r. 2 of the Rules of Court 2012, the petitioner should have filed an originating summons to invalidate TCK's appointment as the respondent's PL.

J. Winding Up By Court And Voluntary Winding Up

[40] The following provisions in CA are relevant in this case:

211. The winding up of a company may be either:

(a) by the Court; or

(b) voluntary

217(1) A company (whether or not it is being wound up voluntarily) may be wound up under an order of the Court on the petition of:

(a) …

(b) any creditor, including a contingent or prospective creditor, of the company; …

217(2) Notwithstanding anything in subsection (1):

(a) …

(d) *the Court shall not, where a company is being wound up voluntarily, make a winding up order unless it is satisfied that the voluntary winding cannot be continued with due regard to the interests of the creditors or contributories.*

254(1) A company may be wound up voluntarily:

(a) …

(b) **if the company so resolves by special resolution.**

254(2) A company shall:

(a) within seven days after the passing of a resolution for voluntarily winding up lodge a printed copy of the resolution with the Registrar; and

(b) within ten days after the passing of the resolution give notice of the resolution in a newspaper circulating generally throughout Malaysia.

255(1) Where the directors of a company have made a statutory declaration in the prescribed form which has been lodged with the Registrar and with the Official Receiver:

(a) **that the company cannot by reason of its liabilities continue its business; and**

(b) *that meetings of the company and of its creditors have been summoned for a date within one month of the date of the declaration,*

the directors shall forthwith appoint an approved liquidator to be the provisional liquidator.

255(2) A provisional liquidator shall have and may exercise all the functions and powers of a liquidator in a creditors' winding up subject to such limitations and restrictions as may be prescribed by the rules.

255(3) The appointment of a provisional liquidator under this section shall continue for one month from the date of his appointment or for such further period as the Official Receiver may allow in any particular case or until the appointment of a liquidator (whichever first occurs).

…

255(6) A voluntary winding up shall commence:

(a) *where a provisional liquidator has been appointed before the resolution for voluntary winding up was passed, at the time when the declaration referred to in subsection (1) was lodged with the Registrar; and*

(b) **in any other case, at the time of the passing of the resolution for voluntary winding up.**

256(1) The company shall from the commencement of the winding up cease to carry on business, except so far as is in the opinion of the liquidator required for the beneficial winding up thereof, but the corporate state and corporate powers of the company shall notwithstanding anything to the contrary in its articles, continue until it is dissolved.

263(2) After the commencement of the winding up, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

276 Where a petition has been presented to the Court to wind up a company on the ground that it is unable to pay its debts the company shall not without the leave of the Court resolve that it be wound up voluntarily.

(emphasis added)

[41] The respondent has relied on ss. 255(1)(a), (b), (3) and (6)(a) CA to commence voluntary winding up in the following manner without a special resolution by the respondent's contributories:

(a) the respondents' directors resolution has been passed;

(b) the respondent's SD is lodged with the ROC and the OR in accordance with ss. 255(1)(a) and (b) CA; and

(c) TCK has been appointed as the respondent's PL by the respondent's directors as provided in s. 255(1) CA.

[42] With the appointment of TCK as the respondent's PL in its voluntary winding up, the respondent's application is then filed for this winding up court's leave under s. 276 CA to continue with the respondent's voluntary winding up.

[43] I am unable to find a Malaysian case which discusses the legality of the manner of the respondent's voluntary winding up in this case. Nor am I able to find any case in Singapore, Australia, New Zealand and England (these countries have provisions in their companies legislation which are similar to our CA) which can shed light on the validity of the respondent's voluntary winding up by way of appointment of a PL.

[44] I shall discuss the application of ss. 211(a), (b), 217(1), (2)(d), 254(1)(b), 255(1)(a), (b), (3), (6)(a), 256(1), 263(2) and 276 CA in respect of two scenarios, namely:

(a) when a company has commenced voluntary winding up and a winding up petition is subsequently presented against the company on the ground of that company's inability to pay its debts ('first scenario'). It is to be noted that this case does not fall within the first scenario; and

(b) when a winding up petition has already been filed on the ground that a company is unable to pay its debts and the company later decides to embark on a voluntary winding up process ('second scenario').

[45] In the first scenario, I am of the following view:

(a) the winding up court may still proceed with the petition. This is clear from ss. 217(1) and (2)(d) CA. Under s. 217(2)(d) CA, the winding up court may wind up a company which is being wound up voluntarily, after the court is satisfied that the voluntary winding up cannot be continued with due regard to the interests of that company's creditors or contributories. I refer to the following decisions:

(i) the Selangor High Court's judgment in *Re Seremban General Agency Ltd* (1923) 3 FMSLR 3, at pp. 3 and 4, which applied the Companies Enactment 1917 of the Federated Malay States. In *Re Seremban General Agency Ltd*, the respondent company passed an extraordinary resolution for a voluntary winding up of the respondent company. A winding up petition was subsequently filed and the Selangor High Court allowed the petition despite the respondent company's earlier voluntary winding up; and

(ii) the judgment of the Federal Court of Australia in *Progress Printers and Distributors Pty Ltd v. Production and Graphics Communications Pty Ltd* (1996) 21 ACSR 241, at pp. 241 and 245. In *Progress Printers and Distributors Pty Ltd*, the respondent company applied for leave *nunc pro tunc* (retrospective leave) from the winding up court to continue a creditors' voluntary winding up. Tamberlin J in the Australian Federal Court did not grant leave and instead wound up the respondent company. It is to be noted that this decision of the Federal Court of Australia is one of first instance and is not an appellate decision;

(b) s. 254(1) CA provides the general rule that a company should commence voluntary winding up by a "special resolution" within the meaning of s. 152(1) and (2) CA. Section 255 CA is a "limited exception" which allows a company to commence voluntary winding up process for a limited period of one month by appointing a PL without a special resolution passed by the company's contributories. I use the phrase "limited exception" for the following reasons:

(i) according to s. 255(3) CA, the appointment of a PL under s. 255(1) CA "shall continue":

A (1) for one month from the date of the PL's appointment or for such further period as may be allowed by the OR ('first event'); or

(2) until the appointment of a liquidator ('second event')

dependent on the first occurrence of the first or second event.

B If the OR does not extend the PL's appointment and if there is no appointment of a liquidator of the company, the PL's appointment is only for a limited period of one month under s. 255(3) CA. In the Singapore High Court case of *Sysma Construction Pte Ltd v. EK Development Pte Ltd* [2007] 2 SLR 742, at paras. 1-5, the respondent C company commenced voluntary winding up by appointing two PL's. The creditors' meeting of the respondent company subsequently appointed the two PL's as liquidators for the respondent company's voluntary winding up. In *Sysma Construction Pte Ltd*, the respondent company's creditors did not object to the D voluntary winding up and hence, the legality of the respondent company's voluntary winding up was not in issue;

(ii) the above construction of s. 255(3) CA is supported by s. 255(1)(b) CA which require the statutory declaration of the company's directors (SD) to affirm that meetings of the company's E contributories and creditors have been summoned for a date within one month from the date of the SD. The company's contributories and creditors are entitled to appoint their own choice of liquidator under ss. 258(1) and 259(2) CA respectively. The one-month period provided in s. 255(1)(b) and 255(3) CA is intended by the legislature F for the PL to remain in office until the meetings of the company's contributories and creditors can be held to appoint a liquidator of their choice;

(iii) the CA has been revised under the Revision of Laws Act 1968. Accordingly, Part 1 of the Interpretation Acts 1948 and 1967 ('IA') G applies in the construction of CA (please see s. 2(1)(b) IA). Section 17A IA (in Part 1 of IA) allows ss. 254 and 255 CA to be construed in a manner which will "promote the purpose or object" of those provisions. In *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 H MLJ 97, at pp. 105-106, 108-109 and 130, the Federal Court applied s. 17A IA to give a purposive interpretation of the Palm Oil Research and Development Act 1979.

Based on s. 17A IA, my purposive construction of the exceptional provision of s. 255 CA (voluntary winding up of a company without I a special resolution of the company's contributories) is as follows:

(1) a company's directors owe fiduciary and statutory duties to the company under Malaysian case law and s. 132(1), (1A) and (1B) CA to exercise reasonable care, skill and diligence for a proper purpose and in good faith in the company's best interest:

(1A) to decide whether the company's business can or cannot be continued due to the company's liabilities; and

(1B) if the company's business cannot be continued due to the company's liabilities, whether a PL has to be appointed forthwith.

I reject the contention that the company's directors may decide to cease the company's business solely on the ground that the company's directors do not wish to be personally liable for "fraudulent trading" under s. 304(1) CA. If I allow a company's directors to cease the company's business on the ground that the continuation of the company's business may expose the company's directors to personal liability under s. 304(1) CA, this means that the company's directors can easily abdicate their stringent fiduciary and statutory duties owed to the company by merely affirming a SD and by appointing a PL without any genuine and pressing reason to cease the company's business; and

(2) there should be a valid reason why the company's contributories cannot expeditiously consider and pass a special resolution for the company's voluntary winding up under s. 254(1)(b) CA. There should not be any undue delay for a company's contributories to decide on the "life or death" of the company, namely whether to pass a special resolution to wind up the company voluntarily;

(iv) my above purposive interpretation of s. 255 CA is consistent with the fiduciary and statutory duties owed by a company's directors to the company. Furthermore, the above purposive construction of s. 255 CA, will ensure that the exceptional voluntary winding up procedure under s. 255 CA is not abused so as to stifle unlawfully a winding up petition presented by a company's genuine creditors; and

(v) if the above purposive interpretation of s. 255 CA is accepted, before s. 255 CA can be relied on, there should be credible evidence to show the following two justifications for the company's directors to proceed under s. 255 CA ('two justifications'):

(i) a justification for the company's directors to stop carrying on the company's business and to appoint a PL forthwith to take over the company's affairs from the company's directors ('first justification'); and

A (ii) why the company's contributories cannot expeditiously consider and pass a special resolution to commence a voluntary winding up ('second justification'); and

(c) if the company's directors have two justifications to commence the exceptional procedure in s. 255 CA of a voluntary winding up, upon the B subsequent presentation of a winding up petition, the company is still required to apply for leave of the winding up court under s. 276 CA to continue with the voluntary winding up. This is clear from the words of s. 276 CA. I will discuss later in this judgment on how previous Australian cases are decided on this matter.

C **[46]** I am of the following opinion in respect of the second scenario:

(a) if a winding up petition has already been presented on the ground of a company's inability to pay debts before the company's voluntary winding up, s. 276 CA requires the company to obtain leave of the D winding up court before that company passes a special resolution under s. 254(1)(b) CA to commence voluntary winding up. I rely on the following cases:

(i) *Hasjuara (M) Sdn Bhd v. Bio Science Capital Sdn Bhd; Global Health Capital Sdn Bhd (Applicant)* [2009] 1 LNS 1056; [2010] 7 MLJ 33 E is the only Malaysian case on s. 276 CA. In this case, Nallini Pathmanathan J (as Her Ladyship then was) in the High Court, at p. 337-338, decided as follows:

> There are no reported decisions on s. 276 [CA]. The learned author of *McPherson's Law of Company Liquidation* states as follows:
>
> F
>
> > *There are at least three statutory restrictions on voluntary winding up. The first restriction is when an application has been filed with the court for the winding up of a company in insolvency. In this case, leave of the court is necessary before the company can resolve to wind up voluntarily, the object apparently being to prevent the company* G *from arbitrarily imposing on the applicant the burden of satisfying the court that the voluntary winding up cannot be carried on with due regard to the interests of the creditors. Although such leave may be given retrospectively, the onus of satisfying the court lies on the applicant and can seldom be discharged, because the applicant must establish that there are special circumstances that make it preferable* H *that the company be wound up voluntarily rather than compulsorily. The fact that compulsory winding up will be more expensive will not alone lead courts to grant retrospective leave …* (emphasis added)
>
> This position in law is borne out by the case law submitted by both learned counsel for the applicant as well as for the petitioner. In *Re Akai Australia Pty Ltd* (1978) 3 ACLR 353 Powell J in dealing with I the equivalent provision in s. 276 of the Australian Companies Act 1961 stated as follows:

> … having regard to the provisions of s. 276 of the Companies Act 1961, the company bore the onus of establishing that, in the circumstances which now exist, it is preferable that the company be wound up voluntarily rather than that the company be wound up compulsorily pursuant to an order of this court. In the light of the judgments of Adam J in *Re North Western Fruitgrowers Pty Ltd* [1965] VR 306 of Gowans J in *Re Horsham Kyosan Engineering Co Ltd* [1972] VR 403 and, more recently of Jacobs J in *Re South Australian Air Conditioning Centre Pty Ltd* (1977) 2 ACLR 539, the onus thus accepted by Mr Maconachie was, so it seems to me, properly accepted by him …

And in *Re North Western Fruitgrowers Pty Ltd* [1965] VR 306 Adam J examined s. 276 in some depth before holding as follows:

> … It seems reasonable to assume, from the presence of s. 276 in the Act, that a company which has not, prior to the presentation of a creditor's petition, passed a resolution for a voluntary winding up, was to be in the position of a suppliant required to satisfy the court that it should, notwithstanding a pending petition, be permitted to wind up voluntarily, and so be put in the favourable position created by s. 221(1)(d) to oppose the creditor's petition. *After all, it is for the company to obtain the necessary leave from the court. Why should it be granted such leave unless it can persuade the court that there is good reason for granting it, that is, that in all the circumstances a voluntary liquidation has advantages over a winding up by the court?*
>
> *Although this case dealt with a members voluntary winding up rather than a creditors' voluntary winding up, the principle appears to be the same, that the onus is on the company to establish special circumstances showing that proceeding by way of a voluntary liquidation is preferable to a compulsory winding up by the court.*
>
> *The foregoing being the test, it follows that it is incumbent on the applicant to demonstrate that a voluntary winding up would be preferable and to the interests of the general body of creditors, in comparison to a compulsory winding up by the court.*

(emphasis added); and

(ii) the decision of the Supreme Court of Victoria in *Re North Western Fruit Growers Pty Ltd* [1965] VR 306, at pp. 306 and 307; and

(b) if a company's directors and shareholders commenced voluntary winding up with the intention to interfere with the winding up court's jurisdiction in respect of a winding up petition, such an interference may amount to a contempt of the winding up court. I cite the following cases:

A (i) in *Re Septimus Parsonage & Co* [1901] 2 Ch 424, at pp. 428-430, the English High Court held as follows:

> When a petition is pending for the winding-up of a company, it is a contempt of Court to issue a circular to shareholders of the company containing misrepresentations with the intent to obtain
B a resolution of the company for the voluntary winding-up thereof, and thereby mislead the Court as to the real view of the shareholders and prevent a compulsory winding-up order from being made; and

(ii) *Re Septimus Parsonage & Co* was referred to by both the Court of
C Appeal in *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd* [2001] 4 CLJ 549, at p. 563, and by the Federal Court in the same case, *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401, at p. 411.

[47] If a company has already commenced voluntary winding up and a
D winding up petition has been presented on the company's inability to pay its debts, either before or after the commencement of the company's voluntary winding up, the following Australian cases (in chronological order) have decided that the company may apply for retrospective leave from the winding up court under a provision of the Australian companies legislation
E which is similar to our s. 276 CA:

(a) the decision of the Supreme Court of Victoria in *Re Horsham Kyosan Engineering Co Ltd* [1972] VR 403. In this case, Gowans J, at p. 403 and pp. 406-407, granted retrospective leave because, among others, the petitioning creditor's debt and costs had been paid in full and no other
F creditor had opposed the leave application;

(b) in *Re South Australian Air Conditioning Centre Pty Ltd* (1977) 2 ACLR 539, at pp. 541-542 Jacobs J in South Australia's Supreme Court held as follows:

> G In *Re Horsham Kyosan Engineering Co Ltd* [1972] VR 403 it was held by Gowans J upon consideration of the purpose of s. 276 and analogous provisions elsewhere in the Act, that *there was power to grant leave nunc pro tunc, but the power so construed in my opinion to be exercised sparingly, and only in circumstances in which the court is satisfied of the assent of the creditors, or at least the principal creditors*. The facts
> H of that case [*Re Horsham Kyosan Engineering Co Ltd*] were entirely different. The resolutions for voluntary winding up were passed some twelve months after the presentation of the petition. The petitioning creditor had long since been paid in full, and the petition had been adjourned *sine die*, although never withdrawn or dismissed. It had all for practical purpose been abandoned, and the
> I liquidator appointed by the members and creditors had in fact embarked on his work before he became aware of the outstanding petition. Even then, the order for leave *nunc pro tunc* did not take effect until after a subsequent creditor had been given notice of the

order and afforded an opportunity to move for its discharge. That case is no authority for the grant of leave *nunc pro tunc* in the present circumstances, for in my opinion, the company has failed to establish any case for the exercise of the power to make an order at all, let alone an order *nunc pro tunc*.

When a company is unable to pay its debts, the petitioning creditor, as against the company, is entitled, almost as of right, to a winding up order, although there may be very special circumstances when the petition will not be granted: see Re Crigglestone Coal Co Ltd [1906] 2 Ch 327 at 330-1; Re Concrete Pipes and Cement Products Ltd [1926] VLR 34 at 38-9. If therefore a company applies to the court pursuant to s. 276 for leave to wind up voluntarily, after a petition has been presented, the onus is on the company to satisfy the court that a voluntary winding up is to be preferred to a winding up ordered by the court on the creditors' petition.

(emphasis added); and

(c) in the Supreme Court of New South Wales (NSW) case of *Re Akai Australia Pty Ltd* (1978) 3 ACLR 353, at pp. 357-358, Power J held as follows:

If, as the cases to which I have referred above would seem to demonstrate, the discrimen for determining that it is preferable that the company be wound up voluntarily is that such a course would be more advantageous to the creditors, then, so it seems to me, *the expressed preference of the creditors, while not conclusive of the matter, would be a matter to which one might give some weight as, perhaps, indicating the view of the creditors that a voluntary winding up might be to their advantage. The weight to be given to such an expressed preference, would, however, in my view, vary from case to case, for it seems to me that while, if one were satisfied that such an expressed preference truly represented the views of the general body of creditors one might be disposed to give it great weight, it might well be otherwise if the creditors expressing that view had some special interest to maintain. In such a situation as the latter, one should in my view look at the matter with a somewhat critical eye with a view to determining whether the expressed preference should be discounted or disregarded …*;

(emphasis added)

K. Respondent's Voluntary Winding Up Is Not *Bona Fide*

[48] Based on the affidavit evidence adduced in this case, I find that the respondent's voluntary winding up is not *bona fide* and is contrived to thwart unlawfully both the petitioner's PL application as well as this petition. I decide as such for the following reasons:

(a) despite the petitioner's express allegation in the petitioner's affidavit that the respondent's voluntary winding up was to "forestall and frustrate" the petitioner's PL application and this petition (para. 4, p. 4, of the

affidavit of the petitioner's deponent, Mr Chia Shiou Liang, affirmed on 17 September 2014), no credible evidence has been adduced by the respondent in respect of the two justifications, namely:

(i) why the respondent's directors had to cease immediately the respondent's business on 5 September 2014 and to hand over immediately the respondent's affairs to TCK on that date; and

(ii) why the respondent's contributories cannot expeditiously consider and resolve by way of a special resolution to commence voluntary winding up of the respondent. In fact, no affidavit has been affirmed and filed by any of the respondent's contributories in this case;

(b) as early as in November 2012, Grant Thornton's Report dated 30 November 2012 had made it clear that the CLS Group (the respondent is the holding company in the CLS Group) owed all the creditors of CLS Group a total of RM511,522,010. If the respondent's voluntary winding up is *bona fide*, there is no reason for the respondent to wait until 5 September 2014 (date of the respondent's directors resolution and the respondent's SD) for the respondent to "realise" the need to resort to the voluntary winding up procedure;

(c) the respondent was under AmBank's liquidation for a period of more than six months (from 24 February 2014 (the date of AmBank's winding up order) to 26 August 2014 (when the Court of Appeal set aside AmBank's winding up order)). As the respondent has been previously wound up by AmBank's winding up order and DTK has proceeded to liquidate the respondent (as is clear from DTK's summary), this court does not see any genuine reason for the respondent to commence voluntary winding up;

(d) the letter dated 2 September 2014 from petitioner's solicitors informing Messrs DNW of the petitioner's PL application, in my view, was the impetus why the respondent embarked on a spurious voluntary winding up with unholy haste on 5 September 2014;

(e) no documentary evidence has been adduced by the respondent to show that before 5 September 2014 (the date of the respondent's directors resolution and the respondent's SD), the respondent's directors have been advised by professional and reputable accountants, preferably specialists in corporate insolvency, that voluntary winding up is in the best interest of the respondent's creditors and contributories;

(f) the respondent merely relied on a circular resolution of its directors, namely the respondent's directors resolution. The respondent's directors did not even hold a meeting to discuss the respondent's voluntary winding up in the light of:

(i) AmBank's liquidation;

(ii) DTK's summary;

(iii) this petition;

(iv) the petitioner's PL application;

(v) the wishes of the petitioner and the supporting creditors. The respondent's list of creditors has already acknowledged the respondent's debts due to, among others, the petitioner and the supporting creditors; and

(vi) GCC's petition.

As explained above, the respondent's directors owed fiduciary and statutory duties to the respondent under Malaysian case law and s. 132(1), (1A) and (1B) CA to exercise reasonable care, skill and diligence for a proper purpose and in good faith in the respondent's best interest to decide to continue or not the respondent's business;

(g) Messrs FNA's letter dated 4 September 2014 is clear that the respondent has appointed Messrs FNA as its solicitors to oppose this petition and the petitioner's PL application. There is no reason why the respondent cannot have instructed Messrs FNA to inform the petitioner's solicitors regarding the respondent's voluntary winding up which has already commenced on 5 September 2014. There is therefore a concealment of the respondent's voluntary winding up from the petitioner's solicitors which clearly evidences a lack of good faith regarding the respondent's voluntary winding up;

(h) the letter dated 12 September 2014 from petitioner's solicitors requested Messrs FNA to give immediately all the documents filed in respect of the respondent's voluntary winding up (respondent's voluntary winding up documents) as well as the name of the respondent's PL for the voluntary winding up. Once again, the respondent's refusal to instruct Messrs FNA to give the respondent's voluntary winding up documents and TCK's name to the petitioner's solicitors, shows the respondent's continued concealment of its voluntary winding up which in turn supports the lack of *bona fides* on the respondent's part;

(i) the respondent allowed TKB's default judgment to be entered against the respondent. According to the respondent's list of creditors, the respondent initially owed RM19,608 to TKB. With TKB's default judgment, TKB now has a default judgment of RM488,444,360 against the respondent! The respondent contends that TKB's default judgment is void. I do not accept this contention as it is trite law that TKB's default judgment is valid until set aside by the KLHC in TKB's suit – the High Court's judgment in *Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 CLJ 722; [2001] 4 AMR 4648, at p. 4659. TKB's default

judgment entitles TKB to vote in the respondent's proposed creditors' meeting in respect of who is to be appointed as the respondent's liquidator in its voluntary winding up. In this sense, the petitioner and the supporting creditors have been prejudiced by TKB's default judgment;

(j) the respondent claimed that the respondent's voluntary winding up was necessary so that the respondent could stop its business and this would avoid any allegation of fraudulent trading under s. 304 CA against the respondent's directors. As I have decided above, this is not a valid consideration as the respondent's directors owe fiduciary and statutory duties to the respondent. In any event, this reason cannot be accepted because the respondent purportedly ceased its business on 5 September 2014 and TCK should have exercised his powers as PL for the respondent's voluntary winding up with effect from 5 September 2014 (as provided in s. 255(3) and (6)(a) CA) until 19 September 2014 (the date of the *ad interim* order). This is not the case as TCK's affidavit affirmed that despite TCK's appointment on 5 September 2014, TCK has not exercised any power and function as the respondent's PL. If TCK's appointment had been made in good faith by the respondent's directors, the respondent's directors would have insisted for TCK to assume immediately the PL's appointment and to take over the respondent's business on 5 September 2014. The fact that there is no evidence to show that the respondent's directors have endeavoured to ensure that TCK should take over immediately the respondent's affairs on 5 September 2014, can only mean that the respondent has proceeded with "extra-ordinary" speed to appoint TCK for a collateral purpose, namely to frustrate unlawfully the petitioner's PL application and this petition; and

(k) besides the lack of a paper trail to justify the respondent's directors resolution and the respondent's SD to appoint TCK as the respondent's PL, the respondent's flurry of activities on 5 September 2014 (after the letter dated 2 September 2014 from petitioner's solicitors informing Messrs DNW of the proposed filing of the petitioner's PL application) and the timing of the respondent's voluntary winding up, can only mean that the respondent's appointment of TCK as the respondent's PL, is intended to stifle unlawfully the petitioner's PL application and this petition.

L. Should This Winding Up Court Grant Leave Under s. 276 CA For Respondent's Voluntary Winding Up?

[49] It is to be noted that the proposed voluntary winding up of the respondent company in *Hasjuara (M) Sdn Bhd* has not commenced before an application was made by the respondent company under s. 276 CA. The respondent company did not resort to s. 255 CA to appoint a PL in *Hasjuara (M) Sdn Bhd*. Most importantly, there was no abuse of the voluntary winding

up procedure in *Hasjuara (M) Sdn Bhd* by appointing a PL so as to stifle unlawfully a winding up petition filed by a genuine creditor. For reasons elaborated in the above Part K of this judgment, I am satisfied that the respondent has embarked on a voluntary winding up for an improper purpose, namely to forestall unlawfully the petitioner's PL application and this petition. On this ground alone, I decline leave under s. 276 CA for the respondent to resolve to be wound up voluntarily. A winding up court is empowered, if not duty bound, to refuse leave under s. 276 CA for a voluntary winding up which has been commenced for an improper purpose of hindering unlawfully a valid winding up petition.

[50] The second reason to refuse leave to the respondent under s. 276 CA is because the following four matters in this case need to be investigated by a "compulsory winding up liquidator" and such matters may require the supervision of the winding up court (four matters to be investigated):

(a) TKB's indemnity was purportedly the basis of TKB's suit and TKB's default judgment. There is a need to ascertain the legality of TKB's indemnity and TKB's default judgment;

(b) the respondent's records, including its minute books, register of members, directors, managers and secretaries, had been removed from the respondent's registered office and handed by the respondent's company secretary to one Mr Lim Kien Boon, a director of the respondent, on 21 February 2014, just three days before AmBank's winding up order on 24 February 2014;

(c) during AmBank's liquidation, the respondent's directors did not furnish the required SOA and all the respondent's records to DTK as the then liquidator for the respondent; and

(d) the respondent was the sole shareholder of Team Durable Sdn Bhd ('TDSB') and a substantial shareholder of Golden Sunrays (M) Sdn Bhd ('GSSB'). The respondent disposed of all its shares in TDSB and GSSB on 6 December 2013, just two weeks before the presentation of AmBank's winding up petition.

A liquidator has an avenue under s. 237(3) CA to apply for directions of the winding up court. In *K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors* [2005] 1 CLJ 793, at p. 817; [2005] 2 MLJ 201, at p. 227, the Federal Court held that s. 237(3) CA enables a "compulsory winding up liquidator" to apply to the winding up court for "guidance on matters of law or principle".

[51] The following Australian cases have decided that leave under Australian companies legislation similar to our s. 276 CA, may not be granted if there are matters which require investigation and supervision of the winding up court:

(a) in *Government Insurance Office of NSW v. Krey Investments Pty Ltd* (unreported) (1990), at p. 2, Young J in the Supreme Court of NSW refused to grant retrospective leave and held as follows:

> *The main reason for permitting compulsory winding up is that it is quite clear that there have been some transactions, at least, since May which need investigation.* … This view is reinforced by the considerable amount of effort that the directors seem to have put in to endeavouring to avoid a compulsory winding up.

(emphasis added); and

(b) in *Progress Printers and Distributors Pty Ltd*, at pp. 242-243, a winding up petition had already been filed but the respondent company's contributories subsequently met on 5 July 1996 to resolve to wind up voluntarily the respondent company and appointed a liquidator, one Mr Ellison. Creditors' meeting of the respondent company was purportedly held on 5 July 1996 and adjourned to 31 July 1996 wherein, among others, the voluntary winding up and the appointment of Mr Ellison had been confirmed. The respondent company then applied for the winding up court's leave to continue with the voluntary winding up. Tamberlin J, at p. 244, refused to grant leave and held as follows:

> *In my view, in the present case, the respondent has not made out a case that there are special circumstances sufficient to justify a voluntary winding up. True it is, that some time and expense may be saved by appointing Mr. Ellison, but I do not give great weight to this having regard to the irregularities in the creditors' meetings.* …

(emphasis added)

[52] A third reason to decline leave to the respondent under s. 276 CA is that the respondent's creditors, namely the petitioner and the supporting creditors, in terms of the huge amount of debts due from the respondent to them, are unanimous in opposing the respondent's application. The following Australian cases have decided that the wishes of the creditors, is a relevant fact to be considered in deciding whether the winding up court should grant or decline leave for voluntary winding up:

(a) *Re South Australian Air Conditioning Centre Pty Ltd* (1977) 2 ACLR 539, at p. 541; and

(b) *Re Akai Australia Pty Ltd*, at pp. 357-358.

Based on the above cases, I take into consideration the total value of debts owed by the respondent to the petitioners and the supporting creditors who are united in their opposition to the respondent's application. There is also GCC's petition which is still pending. It is significant to note that TKB with TKB's default judgment did not file a notice of intention to appear in this petition under r. 28(1) WUR. Accordingly, TKB has no *locus standi* in this

petition, the petitioner's PL application and the respondent's application. Last but not least, there is no creditor who supports the respondent's application.

[53] Fourthly, I find that the respondent has failed to discharge the burden to establish special circumstances to show that the respondent's voluntary liquidation is preferable to a compulsory winding up by the court. The respondent's five reasons, in particular a creditors' voluntary winding up is more efficient and cost-effective, a creditors' voluntary winding up will not burden the winding up court and is more democratic, in my considered view, do not amount to special circumstances to justify leave under s. 276 CA. If the respondent's five reasons amount to special circumstances to support leave under s. 276 CA, this may encourage abuses of the voluntary winding up procedure as has happened in this case.

[54] In any event, I am satisfied that based on the reasons elaborated above, the respondent's compulsory winding up by this court is:

(a) to be preferred to the respondent's voluntary winding up; and/or

(b) more advantageous to the respondent's general body of creditors than the respondent's voluntary winding up.

M. TCK's Appointment As Respondent's PL

[55] The respondent has contended that the petitioner should file a new suit under s. 266 CA to invalidate TCK's appointment as the respondent's PL and to remove TCK as the respondent's PL. I am unable to accede to this argument for the following reasons:

(a) as explained above, Part 1 of IA applies to the interpretation of CA. I refer to s. 40(1) IA (in Part 1 of IA) which reads as follows:

> 40(1) *Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.*
>
> (emphasis added)

Section 276 CA confers discretionary power on the winding up court to grant leave for a company's voluntary winding up. It is my considered view that s. 40(1) IA confers power on the winding up court to do whatever is "reasonably necessary" after the winding up court has decided to grant leave or otherwise under s. 276 CA. I rely on the Court of Appeal's decision in *Indah Water Konsortium Sdn Bhd v. Yong Kon Fatt* [2007] 4 CLJ 613, at p. 636, which applied s. 40(1) IA. Accordingly, based on s. 40(1) IA read with s. 276 CA, once I dismisses the respondent's application, I have "reasonably necessary" discretionary power to:

A (i) declare null and void TCK's appointment as PL for the respondent's voluntary winding up; and

(ii) set aside TCS's appointment as the respondent's voluntary winding up PL;

B (b) in *Progress Printers and Distributors Pty Ltd*, at pp. 242, 243 and 244-245, the respondent company had appointed a liquidator, Mr Ellison, for its voluntary winding up. Mr Ellison had carried out "a substantial amount" of work in respect of the respondent company's voluntary winding up and yet, when the Australian Federal Court refused leave for the respondent company's voluntary winding up and wound up the C respondent company, the court appointed another person to be the liquidator for the respondent company's compulsory winding up. Based on *Progress Printers and Distributors Pty Ltd*, if the winding up court can appoint a liquidator for a company's compulsory winding up in place of a "voluntary winding up liquidator" who has already carried out D substantial work in the voluntary winding up, the winding up court certainly has the power to remove a PL appointed for a voluntary winding up;

(c) section 266 CA applies in a voluntary winding up. As this winding up E court has refused leave to the respondent to continue its voluntary winding up, s. 266 CA has no application in this case; and

(d) if I accept the respondent's above contention, this means the petitioner has to file a fresh suit in another court. This will give rise to a duplicity in proceedings which should not be encouraged. More importantly, the F proposed new action will not be heard by the winding up court which is the appropriate forum to hear all matters concerning both voluntary and compulsory winding up of the company in question. The object of s. 276 CA is to enable all matters regarding both voluntary and compulsory winding up of a company to be comprehensively decided by the winding up court. G

[56] I exercise my discretion under s. 276 CA read with s. 40(1) IA to declare null and void TCK's appointment as PL for the respondent's voluntary winding up and I hereby set aside TCS's appointment as the respondent's PL. My decision is premised on the following grounds:

H (a) for reasons explained in Part K of this judgment, the respondent's voluntary winding up and TCK's appointment as the respondent's "voluntary winding up PL" by the respondent lacked *bona fides*;

(b) as elaborated in the aforesaid Part L, this winding up court declines to grant leave under s. 276 CA for the respondent's voluntary winding up. I Accordingly, TCK cannot continue as PL for the respondent's voluntary winding up;

(c) by virtue of s. 255(3) CA, TCK's appointment as PL for the respondent's voluntary winding up, has lapsed after one month on 5 October 2014 as there is no extension of TCK's appointment by the OR and a liquidator for the respondent's voluntary winding up has not been appointed;

(d) for reasons explained later in this judgment, this winding up court allows the petitioner's PL application. Hence, there is no need for TCK to remain as the respondent's PL; and

(e) TCK has admitted that he has not commenced any work as PL for the respondent's voluntary winding up.

[57] I must make clear that no imputation has been cast in this case on the integrity, reputation and competence of TCK. The respondent's directors are the ones who have appointed TCK as PL for the respondent's voluntary winding up and they should be solely responsible for such an invalid appointment.

N. Does s. 263(2) CA Stay Petitioner's PL Application And This Petition?

[58] Since this winding up court has declined leave under s. 276 CA for the respondent to continue with its voluntary winding up (please see Part L of this judgment), this means that the respondent's voluntary winding up has ended. Accordingly, s. 263(2) CA does not apply in this case to stay the petitioner's PL application and this petition.

[59] Assuming s. 263(2) CA applies to the petitioner's PL application and this petition, this winding up court hereby grants leave for the continuation of the petitioner's PL application and this petition. Leave of this winding up court is granted under s. 263(2) CA for the following reasons:

(a) as explained in the aforesaid Part K of this judgment, the respondent's voluntary winding up in this case is not genuine and is commenced with an oblique motive to stifle unlawfully the petitioner's PL application and this petition; and

(b) the existence of the four matters to be investigated, supports, if not necessitates, the continuation of this petition and the petitioner's PL application.

[60] Section 263(2) CA is in *pari materia* with s. 299(2) of Singapore's Companies Act ('SCA'). There are two Singapore cases which discuss s. 299(2) SCA in the context of a company which has first commenced voluntary winding up and a creditor subsequently applies for leave under s. 299(2) SCA to commence compulsory winding up against the company. I must emphasise in this case that this petition and GCC's petition have already been filed before the respondent's voluntary winding up. The first Singapore case is *Korea Asset Management Corp v. Daewoo Singapore Pte Ltd (In Liquidation)* [2004] 1 SLR 671 with the following facts:

A (a) without prior consultation with the respondent company's creditors, the respondent company initiated a creditors' voluntary winding up by appointing three PL's on 26 May 2003;

(b) the three PL's were then appointed as the respondent company's liquidators by a meeting of the respondent company's contributories on
B 23 June 2003 (within the one-month time period as provided in s. 291(3) SCA which is identical to our s. 255(3) CA);

(c) the applicant, the majority creditor of the respondent company, had engaged a Korean based accounting firm ('Anjin') to conduct a due diligence exercise on the respondent company ('Anjin's Report');
C

(d) Anjin's report indicated, among others, the respondent company's debts had been incurred in dubious circumstances which might be due to mismanagement and/or fraud on the part of the directors and officers of the respondent company; and

D (e) the applicant subsequently applied for leave from the Singapore High Court under s. 299(2) SCA to commence compulsory winding up against the respondent company despite the fact that the respondent company was already in the process of being voluntarily wound up.

E **[61]** In *Korea Asset Management Corp*, VK Rajah JC (now the Attorney General of Singapore) granted leave under s. 299(2) SCA for the applicant to proceed with compulsory winding up against the respondent company. VK Rajah JC held as follows in paras. 2, 41, 58 and 61:

> The present application is unusual in the sense that the applicants, who
F want the company compulsorily wound up, are the undisputed majority creditor.
>
> It is not disputed that at least 70% of the admitted outstanding debt is due to them. *Notwithstanding, the company has chosen to insist on proceeding with voluntary winding up. It has asserted rather implausibly, through its present solicitors, that it is concerned about the additional costs incurred through the possible*
G *appointment of new liquidators should compulsory winding up proceedings be initiated. Given the events that have transpired to date, including the startling losses incurred by the company, I was not impressed by this disingenuous contention and readily allowed the application*. While there has been no appeal, certain interesting points have emerged in this application which ought to be examined and explicated. *I also think it is important to signal to company*
H *management and liquidators alike that the court will vigilantly strive to ensure that fair play and commercial morality prevail in all insolvency matters that come to its attention*. …
>
> *I have referred to s. 253(2)(d) [identical to our s. 217(2)(d) CA] at this juncture, because a court should not grant leave to commence proceedings against a company*
I *in liquidation if the process will ultimately prove to be futile when the matter is heard; in other words, barren litigation should not be given a kiss of life*. Some authorities seem to indicate that the litmus test at the leave stage is whether there

is a serious or substantial issue to be tried; or whether there is, as it is sometimes characterised, "a *prima facie* case". *To my mind, it is consistent with the general taxonomy of the Act and "leave" principles that all the applicant has to do at this stage is to satisfy the court that the application is brought bona fide, underpinned by credible facts and is, even without a serious investigation of the factual matrix, capable of succeeding if and when heard. Though this is not a high hurdle to surmount, the evaluation should in any event be made in the context of certain broad principles, which I shall deal with shortly. It is vital to the integrity of insolvency proceedings that genuine independent creditors can avail themselves of the court's assistance when they do indeed have legitimate grievances.* …

There are however certain additional factors that weigh heavily in favour of granting leave in this case. The Anjin report, for instance, cries out for further enquiry into the circumstances that have led to the demise of the company.

(emphasis added)

[62] I have cited *in extenso* the judgment in *Korea Asset Management Corp* which supports my decision to grant leave under s. 263(2) CA for the continuation of the petitioner's PL application and this petition.

[63] The second Singapore case is *Sysma Construction Pte Ltd*. In this case, Kan Ting Chu J in the Singapore High Court, at paras. 41, 44, 45 and 48, refused leave under s. 299(2) SCA to a creditor to commence compulsory winding up against the respondent company which had already embarked on a voluntary winding up. According to Kan Ting Chu J:

Is there any reason in this case to overrule the creditors' wishes? There is no evidence of any exceptional mismanagement of the company that called for an examination by a court-appointed liquidator. The plaintiff accepted at the creditors' meeting that the necessary investigations could be done by a liquidator appointed by the creditors, and had nominated Mr Ho for the job. …

The situation in this case is different from that in Swain, Palmer or Korea Asset Management where the majority of the creditors wanted the company to be wound up by the court. Here, the plaintiff is a minority creditor, and it did not obtain the support of the other creditors to form a majority block in favour of compulsory winding up.

Did the plaintiff show that it would have a strong and legitimate sense of grievance if the company was not wound up compulsorily, which would offend the general principles of fairness and commercial morality? …

In these circumstances, did any general principle of fairness and commercial morality weigh in favour of the plaintiff's insistence that the company be wound up compulsorily to prevail over the majority decision in support for voluntary winding up? In my assessment, the answer is no, and therefore I dismissed the plaintiff's application for leave to petition for the company to be wound up.

(emphasis added)

[64] The material facts in *Sysma Construction Pte Ltd* are clearly distinguishable from this case but I am satisfied that the general principle of fairness and commercial morality support leave of this winding up court under s. 263(2) CA for the continuation of the petitioner's PL application and this petition.

O. Petitioner's PL Application

Petitioner's PL Application Should Be Allowed

[65] Pending the disposal of a winding up petition, the winding up court has the discretion under s. 231 CA and r. 35(1) WUR to appoint a PL. Section 231 CA and r. 35(1) WUR provide as follows:

> 231. *The Court may appoint the Official Receiver or an approved liquidator provisionally at any time after the presentation of a winding up petition and before the making of a winding up order and the provisional liquidator shall have and may exercise all the functions and powers of a liquidator subject to such limitations and restrictions as may be prescribed by the rules or as the Court may specify in the order appointing him.*
>
> 356(1) *At any time after the presentation of a petition, the Court may, upon the application of any creditor or contributory of the company and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator make the appointment upon such terms as the Court shall think just or necessary.*
>
> (emphasis added)

[66] The following cases provide valuable guidance when there is "sufficient ground" under r. 35(1) WUR for a winding up court to appoint a PL:

(a) VC George J (as His Lordship then was) held in *HSBC*'s case, at pp. 376-377 (MLJ), that there must be evidence that ultimately the winding up court is likely to make a winding up order sought by the petitioner. The following cases require a petitioner applying to appoint a PL, to prove a "good *prima facie* case" to wind up the respondent company:

(i) the Singapore Court of Appeal held as follows in *Pac Asian Services Pte Ltd v. European Asian Bank AG* [1987] 1 LNS 143; [1989] 3 MLJ 385, at p. 389:

> We must first consider the principles governing an application under s. 267 [identical to our s. 231 CA]. *The appointment of provisional liquidators puts the company's affairs under their control. The resulting effect is to practically paralyze the operations of the company. Such an appointment appears the more draconian when it is made on an ex parte application. The company has been delivered a punch before it even steps into the ring.*

> *We agree with Sir Robert Megarry V-C in Re Highfield Commodities Ltd [1985] 1 WLR 149 at p 158, that the court will be slow to appoint a provisional liquidator unless there is at least a good prima facie case for saying that a winding-up order will be made. But that is only the threshold which the applicant must cross. It must still be asked whether it is right in the circumstances of the case that provisional liquidators be appointed.*
>
> (emphasis added);

(ii) in the High Court case of *Re Lo Siong Fong* [1994] 1 LNS 188; [1994] 2 MLJ 72, at pp. 80, 81 and 82, VC George J (as His Lordship then was) set aside a PL appointed *ex parte* by a petitioner on the ground, among others, that the "petition has no hope of being successfully prosecuted";

(iii) the High Court case of *PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd* [1998] 4 CLJ Supp 437; [1995] 1 MLJ 21, at pp. 24-25;

(iv) *Emporium Jaya*'s case, at p. 30;

(v) the High Court's decision in *Ameriasa Tours & Travel*'s case, at p. 590; and

(vi) the judgment of the High Court in *Wiraflor (Malaysia) Sdn Bhd v. Bio Science Capital Sdn Bhd* [2011] 4 CLJ 441; [2011] 2 MLJ 94, at p. 103;

(b) there is a need to preserve the *status quo,* namely to preserve the assets of the respondent company and to prevent their dissipation in the interest of the respondent company's creditors. The following cases are relevant:

(i) in *Pac Asian Services Pte Ltd*, at pp. 391-392 (MLJ), the Singapore Court of Appeal requires evidence of real danger that the respondent company's assets may be dissipated to the detriment of all the respondent company's creditors before the hearing of the petition;

(ii) *Re Lo Siong Fong*, at p. 82 (MLJ), VC George held the following:

> … the purpose for the appointment of a provisional liquidator is primarily to preserve the assets and otherwise maintain the *status quo* pending the determination of the petition to wind up the company.
>
> (emphasis added);

(iii) *Emporium Jaya*'s case, at p. 30;

(iv) *Ameriasa Tours & Travel*'s case, at p. 590; and

(v) *Wiraflor (M) Sdn Bhd*, at pp. 103, 115 and 116;

A (c) there is some degree of urgency to appoint the PL:

(i) *Emporium Jaya*'s case, at pp. 31 and 32; and

(ii) *Wiraflor (M) Sdn Bhd*, at pp. 103, 115 and 116;

B (d) the winding up court should consider the balance of convenience, namely the winding up court should balance the competing interests as well as the possible loss and damage to the respondent company and its creditors:

(i) *PT Anekapangan Dwitama*, at p. 32;

C (ii) *Emporium Jaya*'s case, at pp. 31 and 37;

(iii) *Ameriasa Tours & Travel*'s case, at p. 592; and

(iv) *Wiraflor (M) Sdn Bhd*, at pp. 103 and 115; and

D (e) it is right in the circumstances of the case to appoint PL – *Pac Asian Services Pte Ltd*, at p. 389 (MLJ).

[67] It is to be emphasised a petitioner should not abuse court process by applying to appoint a PL when the petitioner has no intention to wind up the respondent company – *HSBC*'s case, at p. 379 (MLJ).

E **[68]** I allow the petitioner's PL application for the following reasons:

(a) the petitioner has a good *prima facie* case to wind up the respondent because:

F (i) the petitioner has obtained the summary judgment against the respondent. As the respondent has not appealed to the Court of Appeal against the summary judgment, the summary judgment is final and *res judicata* against the respondent – the Supreme Court's judgment in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189, at pp. 197-198, 198-199 and 199-200; and

G (ii) the respondent's own admission of inability to pay its own debts in:

(1) respondent's directors resolution;

(2) respondent's SD; and

H (3) respondent's list of creditors;

(iii) the respondent's own conduct in appointing TCK as its PL for the voluntary winding up;

(iv) the respondent's failure to pay the summary judgment within the I stipulated period as demanded in the petitioner's statutory demand dated 29 January 2014. Hence, a rebuttable presumption of the respondent's inability to pay its debts arises under s. 218(2)(a) CA. This is clear from the following appellate decisions:

(1) the Supreme Court's judgment in *Sri Hartamas Dvpt Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303, at pp. 307 and 308; and

(2) the Court of Appeal case of *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947, at p. 961.

The respondent did not adduce any evidence in this case so as to discharge the burden on the respondent to rebut this insolvency presumption. In fact, this rebuttable presumption of the respondent's inability to pay its debts has been fortified by the respondent's directors resolution, respondent's SD, respondent's list of creditors and the respondent's conduct of appointing TCK as the respondent's PL for the voluntary winding up; and

(v) as explained above, there are six supporting creditors with a total claim of RM149,153,146.36 against the respondent;

(b) pending the disposal of this petition, there is an urgent need to preserve the status quo and to prevent dissipation of the respondent's assets. This is particular so in view of TKB's default judgment and the fact that the respondent's voluntary winding up lacks good faith;

(c) the balance of convenience is clearly in favour of granting the petitioner's PL application because:

(i) as explained above, the respondent's creditors will be prejudiced if a PL is not appointed to preserve the assets of the respondent; and

(ii) there is no detriment to the respondent by allowing the petitioner's PL application as the respondent has already ceased its business on 5 September 2014. In other words, if I allow the petitioner's PL application, there is no paralysing effect on the respondent's business as explained in *Pac Asian Services Pte Ltd*;

(d) there is no evidence to suggest that the petitioner's PL application constitutes an abuse of court process; and

(e) considering all the circumstances of this case, it is only right to appoint a PL for the respondent's compulsory winding up.

[69] I am satisfied that DTK is a fit and proper person to be appointed as the respondent's PL for this compulsory winding up. My reasons are as follows:

(a) DTK was the respondent's liquidator for the AmBank liquidation and had prepared DTK's summary. As such, DTK has personal knowledge and experience regarding the respondent; and

(b) DTK is also the liquidator for CLSM, a member of the CLS Group.

A *Is r. 35(2) WUR Mandatory?*

[70] Rule 35(2) WUR reads as follows:

> *An order appointing a provisional liquidator in Form 13 shall state the nature and give a short description of the property of which the [PL] is ordered to take possession and the duties to be performed by him.*
>
> (emphasis added)

[71] The respondent contended that the petitioner's PL application did not comply with r. 35(2) WUR and relied on the following two High Court cases:

(a) *Pui Chiau Tien v. Foi Chaw Leong & Anor* [2004] 5 CLJ 145; and

(b) *The Bank of East Asia Ltd Singapore Branch v. Axis Incorporation Bhd* [2009] 5 CLJ 83.

[72] In *Pui Chiau Tien*, at pp. 151-152, and *The Bank of East Asia Ltd*, at p. 86, the High Court set aside the *ex parte* appointment of PL on the ground that the *ex parte* order in question did not comply with the mandatory r. 35(2) WUR by failing to state the nature and to give a short description of the property of which the PL was ordered to take possession and the duties to be performed by the PL.

[73] The petitioner's PL application is an *inter partes* application. Hence, *Pui Chiau Tien* and *The Bank of East Asia Ltd* may be distinguished from this case. Furthermore, I am of the following respectful view:

(a) the winding up court's power to appoint a PL is conferred by s. 231 CA and r. 35(1) WUR. These two provisions do not contain a mandatory requirement as stated in r. 35(2) WUR. To the contrary, the wording of s. 231 CA (The court may appoint (PL) … as the court may specify in the order appointing him) and r. 35(1) WUR (the court may, … make the appointment (of PL) upon such terms as the court shall think just or necessary) provide very wide powers to the winding up court in respect of the appointment of a PL. As explained above, the circumstances in which a winding up court may appoint a PL under s. 231 CA and r. 35(1) WUR have been elaborated in the above paras. 66 and 67 of this judgment and are not confined by r. 35(2) WUR;

(b) r. 35(2) WUR is a subsidiary legislation made under s. 372 CA and s. 16 of the Courts of Judicature Act 1964. According to s. 23(1) IA (Part 1 of IA applies to CA as explained above), any subsidiary legislation that is inconsistent with an Act of Parliament shall be void to the extent of the inconsistency. If r. 35(2) WUR is a mandatory requirement in respect of the winding up court's power to appoint a PL, such a mandatory requirement is inconsistent with the wide powers conferred by s. 231 CA on the winding up court. Hence, such a mandatory requirement under s. 35(2) WUR may be void under s. 23(1)

IA. In *Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190; [1982] 2 MLJ 156, at p. 162, the Federal Court held as follows in respect of O. 42 r. 12 of the then Rules of the High Court 1980 ('RHC') *vis-à-vis* s. 11 of the Civil Law Act 1956 ('CLA'):

> Counsel for the respondent in submitting that interest on this lump sum should be at 8% with effect from the date of trial to the date of realisation relied upon Order 42 rule 12 [RHC]. This order says:
>
> > 12. Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.
>
> Although the Order is expressed in imperative "shall", it is certainly not intended to be so; because to give effect would be incompatible with the discretionary power of the court to order interest under section 11 [CLA]. We do not think that Order 42 rule 12 can override the provision of the Act.

(emphasis added); and

(c) the winding up court has the discretion to dispense with the application of r. 35(2) WUR according to s. 221(2)(b) CA and r. 194(1) WUR.

[74] I exercise my discretion under s. 221(2)(b) CA read with r. 194(1) WUR and order DTK as the respondent's PL to file Form 13 as required by r. 35(2) WUR within seven days from the date of DTK's appointment on 23 October 2014. This exercise of discretion is premised on the following reasons:

(a) there is no prejudice to the respondent, the respondent's creditors and contributories if Form 13 is filed after DTK's appointment as the respondent's PL; and

(b) there is no advantage to the respondent's compulsory winding up if the petitioner immediately complies with r. 35(2) WUR in respect of DTK's appointment as the respondent's PL.

P. Court's Decision On Petitioner's PL Application And Respondent's Application

[75] Based on the above reasons, this court makes the following orders on 23 October 2014:

(a) the respondent's application is dismissed;

(b) DTK is appointed as PL for the respondent to take possession of all the assets of the respondent and to preserve the status quo pending the disposal of this petition;

(c) TCK's appointment as PL for the respondent pursuant to the respondent's directors resolution is declared null and void and is hereby set aside;

(d) costs of RM10,000 to be paid by the respondent to the petitioner in respect of the petitioner's PL application (which has been allowed) and the respondent's application (which has been dismissed);

(e) costs of RM2,000 to be paid by the respondent to SCB (whose solicitors have filed a written submission to support the petitioner's PL application and to oppose the respondent's application);

(f) costs of RM1,000 to be paid by the respondent to:

(i) AmBank;

(ii) HLB; and

(iii) CIMB;

(g) no order of costs against TCL; and

(h) Form 13 to be filed by the petitioner within one week from 23 October 2014.

Q. Hearing Of This Petition

[76] When this petition was heard on 27 October 2014, it is clear that the respondent was unable to pay its debts within the meaning of s. 218(1)(e) CA. I decide as such for reasons stated in the above sub-para. 68(a) of this judgment.

[77] Despite the commercial insolvency of the respondent which has been admitted by the respondent, as required by s. 217(2)(b) CA, I should only wind up the respondent if I am satisfied that the respondent's voluntary winding up cannot be continued with due regard to the interests of the respondent's creditors and contributories.

[78] Pursuant to s. 217(2)(b) CA, this winding up court is satisfied that the respondent should be compulsorily wound up as the respondent's voluntary winding up cannot be continued with due regard to the interests of the respondent's creditors and contributories. This decision is based on the following reasons:

(a) this winding up court has declined leave under s. 276 CA for the respondent's voluntary winding up;

(b) in the interest of the respondent's creditors, the four matters to be investigated should be supervised by the winding up court; and

(c) there is no evidence of any surplus to be distributed to the respondent's contributories. Hence, the interest of the respondent's contributories is of "little consequence" according to the Singapore High Court's judgment in *Korea Asset Management Corp*, at para. 39.

[79] Based on the above reasons, I have no hesitation to wind up the respondent and appoint DTK as its liquidator. My decision is supported by the following cases wherein the courts have compulsorily wound up the respondent companies despite the fact that those companies have embarked on voluntary winding up:

(a) *Re Seremban General Agency Ltd*, at pp. 3-4; and

(b) *Progress Printers and Distributors Pty Ltd*, at p. 245.

[80] I have not overlooked the case of *Re Southard & Co Ltd* [1979] 3 All ER 556, at pp. 556-557, wherein the English Court of Appeal affirmed the High Court's dismissal of a winding up petition against the respondent company so that the respondent company's voluntary winding up could continue. *Re Southard & Co Ltd*, at pp. 558 and 563, can be explained on the following grounds:

(a) the independent creditors of the respondent company supported the respondent company's voluntary winding up and not compulsory winding up;

(b) the petitioning creditor owned all the shares of the respondent company and was "morally responsible" for the respondent company's insolvency; and

(c) the petitioning creditor had initially put the respondent company into voluntary liquidation!

[81] DTK has been appointed as the respondent's PL on 23 October 2014 and with his appointment as the respondent's liquidator four days later, I do not see any benefit to the respondent's compulsory liquidation for Form 13 to be filed. Nor is there any prejudice to the respondent's liquidation, respondent's creditors and contributories if the filing of Form 13 is dispensed with. Accordingly, this court exercised its discretion under s. 221(2)(b) CA and r. 194(1) WUR to dispense with the filing of Form 13.

[82] I made the following orders on 27 October 2014:

(a) the respondent is wound up and DTK is appointed as its liquidator;

(b) the respondent to pay costs of RM5,000 to the petitioner; and

(c) the filing of Form 13 be dispensed with.